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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 419

ROLAND E. BARNES,

Petitioner,

v.

ABRAHAM S. SIND AND ISRAEL COHEN, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents, Abraham S. Sind and Israel Cohen, partners, trading as A. Sind & Associates, and Abraham S. Sind and Israel Cohen, individually, oppose the granting of a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, in the above entitled case, for the reasons set forth below.

QUESTION PRESENTED

We disagree most strongly with the statement by the petitioner of the question presented. It is an attempt to distort an issue relating to the specific performance of an alleged contract under Maryland law to an issue of equal protection under the United States Constitution. The jurisdiction of the United States District Court for the District of Maryland was invoked by the petitioner in his suit on the basis of diversity of citizenship and no question of federal law was claimed to be involved (A. 1).[1] Actually the petitioner is now seeking to have this court decide whether the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit applied correctly the Maryland law relating to specific performance of contracts for the sale of real estate to the facts of this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

For the reasons we have set forth above (and as will more fully appear from the facts which we have hereinafter set forth) it is apparent that the constitutional and statutory provisions referred to by the petitioner in his petition are in no way applicable to this case.

STATEMENT OF THE CASE

The so-called purchase agreement of October 9, 1961 referred to in the petition (Page 4) was not, in fact, a contract of sale but was merely a receipt for a deposit on a printed form which expressly required the approval of the developers. It is admitted that this approval was never given (A. 37). Following the return of the petitioner's deposit extended negotiations took place which resulted in an agreement dated January 9, 1962 prepared

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[1] "A." references are to the pages of the record printed as the Appendix to petitioner's brief below.

by petitioner's attorney. The agreement provided 3 alternatives: The first was to make available to petitioner on or before March 15, 1962 a house substantially equivalent to the one covered by the document of October 9, 1961, with prices and terms no less favorable to petitioner than those in the document of October 9, 1961. "Substantially equivalent" was defined as substantially equivalent in value, in size and number of rooms, in proximity to the Rockville schools and community and in neighborhood facilities and surroundings. The term "make available" was defined as the finding of a seller ready, willing and able to sign a contract with petitioner for the sale of such a house. There was a provision for arbitration in the event of a dispute as to substantial equivalence. The second alternative provided that if a substantially equivalent house was not made available by March 15, 1962 then respondents would be obligated to deliver to petitioner the house and the specific lot decribed in the document of October 9, 1961 between March 15, 1962 and August 31, 1962, but with the further option to respondents to substitute for the specified house and lot and to make delivery to petitioner prior to August 31, 1962 of an identical house on an equivalent lot in the respondents' development. There was a provision for arbitration in the event of a question as to whether the lot was, in fact, "equivalent". There was no definition of what constituted "equivalence" nor any provision to compel respondents to offer a different lot if the tendered lot was deemed not to be equivalent. The lot originally selected by the petitioner and specified in the paper writing of October 9, 1961, had been sold by the respondents prior to the making of the agreement of January 9, 1962. Prior to the signing of this last mentioned agreement it was made known by the respondents to petitioner's attorney that this lot was not available and their testimony to this effect was not denied (Tr. 309, 310, 396).[2] In pur-

[2] "Tr." references are to the transcript of the trial in the District Court on file with this court.

suance of the second alternative the respondents exhibited a house to the petitioner which he rejected. This left the third alternative to provide an identical house on an equivalent lot and this is the provision in dispute. Respondents admittedly offered to petitioner an identical house in their development within the time limited by the agreement of January 9, 1962. The District Court found (A. 40) that respondents were ". . . .willing and able, in good faith. . . ." to deliver this house and the lot upon which it was erected to the petitioner if he had accepted it. This house was rejected by petitioner on the ground that the lot was not equivalent. The following remarks of the Court of Appeals in the majority opinion denying petitioner's request for a rehearing en banc are noteworthy. "Since the district court's decree of specific performance was unacceptable to the plaintiff, as was every house and lot tendered to him as the equivalent of the one he first sought to buy, it now seems appropriate that he should be limited to his damages." (Page 22 of appendix to the petition filed in this court.)

Petitioner then instituted his diversity suit in the United States Court for the District of Maryland, he being then a resident of the City of Washington in the District of Columbia and the respondents being residents of the State of Maryland. In that suit petitioner sought conveyance to him of an identical house on a lot in the respondents' development. Petitioner did not seek this lot on the ground that it was equivalent to the original lot but stated that it was the nearest equivalent. As stated by the District Court in its opinion (A. 39) petitioner takes the position that none of the lots in respondents' development improved by the type of house which he desires are equivalent to the lot originally selected by him. He sought a monetary allowance by reason of the alleged lesser value of the available lot as compared to the original lot and also sought damages for alleged breach of contract.

The lot designated by petitioner in his suit had been sold and the District Court then granted an injunction

prohibiting the respondents from disposing of still another lot in their development which had been improved by an identical house. Petitioner expressly refused to amend his complaint to seek the conveyance to him of this last mentioned house and lot as equivalent (A. 41) but notwithstanding this deficiency the District Court decreed the conveyance of this house and lot to the petitioner upon what the District Court took to be the petitioner's offer made in closing argument (A. 41) to accept this lot as equivalent and to waive any claim for damages because the lot was not equivalent (A. 41).

It had developed from the testimony in the case that title to the lot was vested in the individual name of Abraham Sind, one of the respondents herein. Sind was then and is now married. Petitioner did not see fit to make Sind's wife a party defendant to the action in the District Court, nor did he seek, at any time, to amend his proceedings by bringing Mrs. Sind in as a party defendant.

Although he seeks to disguise it the gravamen of petitioner's appeal to the Court of Appeals and of his petition in which he seeks to have this court assume jurisdiction is his dissatisfaction with the application by both the District Court and the Appellate Court of applicable Maryland law which required the petitioner, as a condition of specific performance, to take what title the respondents could give.

The fact that title was in the name of Abraham Sind alone was a matter of public record and the fact that Sind was a married man was readily ascertainable. It is apparent that the result of which the petitioner now complains was due to his negligence in not making Mrs. Sind a party defendant. Whether he would have prevailed against her had he taken this course is not now material. The vital point is that under Maryland law which the District Court was required to apply in this case, the Court could not have given petitioner any more than it did and, again applying Maryland law, petitioner was required to either accept what title the respondents were able to give

him and pay the full purchase price or renounce his claim to specific performance. He elected the former alternative but, in effect, by his appeal he attempted to avoid the effect of his election. His intention, concealed by him from the District Court, not to abide by his election, freely made at the trial, was the basis upon which the Appellate Court properly vacated the judgment granting specific performance.

In footnote 2 on page 5 of his petition the petitioner states that respondents' major defense at the trial was "a strange attack upon Petitioner's counsel". A reference to respondents' brief filed in the Court of Appeals will demonstrate the falsity of this statement. In that brief respondents, apart from questions relating to damages which are not material here, argued three points. The first point was that the agreement of January 9, 1962 was not susceptible of specific performance. This was and is a major defense. An examination of the contract of January 9, 1962 will disclose that it does not establish any standards by which lot equivalence might be determined. While the District Court did not agree with respondents' contention the Court of Appeals did not find it necessary to pass on this contention because of reversal on another ground.

The second point raised by respondents in their brief was inequitable conduct on the part of the petitioner. As to this point it is true that the District Court did not find duress but did find that petitioner's counsel "drove a hard bargain with Defendants when he found that they could not stand the publicity" (A. 39) and that the provision in the contract drawn by him relating to liquidated damages "was intended to be a penalty." (A.39). The Court of Appeals in view of the reversal upon another ground did not pass upon the question of duress (Pages 20, 21 of the appendix to the petition filed in this court).

The third point raised in respondents' brief in the Court of Appeals is the one upon which the Court of Appeals reversed the judgment for specific performance.

Under this point respondents made the contention that under Maryland law a plaintiff seeking specific performance (where a wife of a Defendant having title is not made a party to the action) must offer to take what the plaintiffs are able to give, namely, title subject to the wife's right of dower, and must also pay the full purchase price. This is established Maryland law applicable to negro and white alike. *Trotter v. Lewis*, 185 Md. 528, 48 A.2d 329; *Whittle v. Brown*, 217 Md. 161, 141 A.2d 917; *Schneider v. Davis*, 194 Md. 316, 71 A.2d 32.

REASONS TO DENY WRIT

1. As we have noted above petitioner attempts to distort simple issues of contractual rights arising under Maryland law relating to specific performance of contracts into a question of racial discrimination. Maryland cases over a long period of years have uniformly held that absent the joinder of the spouse of a person holding title to real estate in the contract of sale, or failure to join such spouse as a defendant in an action to enforce the contract, results in the vendee having the alternative of offering to take title subject to dower and paying the full purchase price or relinquishing his purchase. This, and this alone, is the ground upon which the judgment of the District Court granting specific performance was reversed.

Petitioner represented to the District Court (A. 41) that he was willing to take title subject to Mrs. Sind's right of dower and pay the full purchase price but made this representation to the court never intending to comply with it. These are not our words but the words of the Court of Appeals. The Court of Appeals properly took the view that his appeal from the action of the District Court refusing to require the respondents to execute a warranty deed was an effort by the petitioner to depart from his representation to the District Court that he would take title in the manner referred to above. After so agreeing he sought by his appeal to compel a deed

which he thought would enable him to bring a new action against the respondents if the wife of the title holder refused to join in the deed. He left the Court of Appeals no alternative other than to reverse the judgment of specific performance. In the words of the Court of Appeals " . . . . the frank statement of his intention in his brief on appeal discloses plainly now what was obscured in the District Court — that he never was prepared to take the step of an unequivocal payment of the full purchase price by which alone he would be entitled to specific performance. If the petitioner had informed the District Court of his intention, which he has laid bare before us, the District Court would not have entered the order that it did." (Page 20 of the appendix to the petition filed in this court.)

2. As we have stressed throughout this brief, the question involved does not arise under federal law, involves no constitutional issues, and is simply one of the Maryland law relating to the specific performance of contracts for the sale of real estate. As the District Court remarked in its opinion (A. 41) the wife of the title holder was not made a party defendant apparently because "counsel for Plaintiff had not taken the trouble to check the Land Records to determine in whose name title to the several lots in question was held. They have generally treated this case as a crusade rather than as a civil action involving questions of fact and law."

3. Petitioner sought a rehearing in the Court of Appeals which was denied. Petitioner attempts to make capital out of the dissent by the minority to the action of the majority of the court in denying the petition for rehearing. With all deference to the minority it is apparent from Judge Sobeloff's opinion that no consideration was given by the minority to applicable Maryland law. The statements made in the minority opinion are answered completely and decisively by the following language in the majority opinion. "Since the District Court's decree of specific performance was unacceptable to the Plaintiff,

as was every house and lot tendered to him as equivalent to the one he first sought to buy, it now seems appropriate that he should be limited to his damages."

CONCLUSION

There being no issues of federal or constitutional law involved the only issue raised by the petition is whether the courts below applied correctly applicable Maryland law to the facts of this case. This not being a proper ground (Rule 19 of this court) to invoke the jurisdiction of this court the writ should be denied.

Respectfully submitted,

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